

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2018-404-

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

UNDER

section 116 of the Real Estate Agents Act 2008

IN THE MATTER

of an Appeal against the decisions of the Real Estate Agents Disciplinary Tribunal as to charges and penalty, on 9 July 2018 and 24 October 2018

BETWEEN

TRACY TAYLOR of 25 Kaikoura Street,
Henderson, Auckland, Company Director.

Appellant

AND

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 413)**

Respondent

NOTICE OF APPEAL

Dated this 16th day of November 2018

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NOTICE OF APPEAL

To: The Registrar of the High Court, Auckland
And to: The Respondent, the Real Estate Agents Authority (CAC 413)
And to: The Registrar, the Real Estate Agents Disciplinary Tribunal

MAY IT PLEASE THE COURT:

1. The Appellant, Tracy Taylor, gives notice that she is appealing to this Honourable Court against the decisions of the Real Estate Agents Disciplinary Tribunal ("READT") as to charges and penalty, dated 9 July 2018 and 24 October 2018, in proceeding READT 046/17 ([2018] NZREADT 59) copies of which are attached to this notice of Appeal ("the Decisions").

Specific Grounds of Appeal

2. **Refer paragraph [10] of the Decision as to Charges:** The READT erred in fact, when it determined "*Once again, on each of the transactions relating to 13 Artillery Drive, Ms Taylor received \$10,000.00 commission.*" Ms Taylor received no commission from the properties that were the subject of the Charges before the AEDT.
3. **Refer paragraph [11] of the Decision as to Charges:** The READT erred in fact, when it determined that:
 - 3.1 There was more than one transaction (that is, an application for mortgage finance) to Westpac Bank Limited ("Westpac") – there was only one application.
 - 3.2 There was more than one agreement submitted to Westpac in support of more than one loan application - there was only one agreement submitted to Westpac, for 4A Shirley Avenue.
 - 3.3 "*Ms Rutherford does not say how much the purchasers...*" were borrowing - Ms Rutherford gave evidence before the Tribunal that the purchasers were pre-approved finance up to \$1.2 million.
 - 3.4 "*The purchase price that Ram had paid was not disclosed.*" - The purchase price between the current and former owner is never disclosed for an application by a purchaser. A purchaser is not entitled to such agreements and the vendor is not obliged to tell a purchaser what he previously purchased the property for.

- 3.5 *"Ms Rutherford considered the application and came to the view that the "estimated selling range" was between \$691,667 and \$832,330."* - Ms Rutherford did not come to a view on the estimated selling range. Ms Rutherford accessed an e-valuation for the property, as is the custom of all lending facilities, to obtain a current market value range for the property.
4. **Refer paragraph [12] of the Decision as to Charges:** The READT erred in fact, when it determined that:
- 4.1 *"It was further significant because it marked the commencement point of a pattern where Ms Taylor as the selling agent received \$10,000 plus GST in commission."*
There was no pattern of receiving commission. The Kilbryde property was the only property mentioned by the Tribunal where Ms Taylor received a commission, and the amount was \$3,500.00 before tax and GST – the majority going to her employer, LJ Hooker, who have faced no investigation or charges.
5. **Refer paragraph [16] of the Decision as to Charges:** The READT erred in fact, when it determined that:
- 5.1 *"She prepared the ASP and received an agreed commission of \$10,000."* - Ms Taylor received no commission from the Shirley Avenue property, because it did not sell, because Westpac did not lend to the Yadavs.
6. **Refer paragraphs [17] and [18] of the Decision as to Charges:** The READT erred in fact and law, when it determined that it considered the Shirley Avenue transaction "questionable" for the purposes of its determination against Ms Taylor, when questionable transactions are not the proper basis for any determination of an agent's liability under the Act and before the Tribunal, unless Ms Taylor had been an active participant in that transaction, including the presentation of fraudulent material to a lender in order to secure finance.

7. **Refer paragraph [19] of the Decision as to Charges:** The READT erred in fact, when it determined that:
- 7.1 *"Again, Ms Taylor was instructed as the agent and again received a flat commission of \$10,000. She did not provide Ram with a CMA or carry out any marketing work in relation to the property, the parties already having agreed the on-sale price between themselves."* – Ms Taylor did not receive a commission for 13 Artillery Drive.
- 7.2 *"As well the Committee points to the fact that finance was going to be required for the transaction and that the purchase agreement would be the basis of a finance application to the bank."* – there was no evidence of a finance application before the READT, and if there was finance obtained, there was no evidence before the Tribunal that Ms Taylor had in any way been involved in that process, because any sale that went through did so without her knowledge, because she received no commission for the sale and there was no evidence before the Tribunal that finance was obtained, or that the sale was finalised.
8. **Refer paragraph [20] of the Decision as to Charges:** The READT erred in fact and law, when it ultimately determined that (as to the Committee's assertion of two aberrant aspects to the transactions):
- 8.1 *"In summary, there were the significant over market prices obtained for the on sale of 4A Shirley Avenue and 13 Artillery Drive."* - Significant overmarket prices was not an aberrance in the volatile housing market of Auckland at the time.
- 8.2 *"Secondly, in none of the transactions was Ms Taylor involved in facilitating negotiations about price and representing the vendor's interest in that regard."* - Ms Taylor's obligations to inform the vendor of an offer were met in all three transactions. Nothing else was asked of her than to prepare the Sales & Purchase Agreements and, in the two transactions in which she did not receive commissions, she did not provide CMA's because they were not wanted by the vendor. Although unusual, again that is not an "aberration".
- 8.3 *"In both the second and third transactions (4A Shirley Avenue and 13 Artillery Drive) finance was going to be required and the purchasers intended to provide the agreements to a bank to support an application for finance."*

- Finance may well have been required, but there was no evidence of finance being obtained for the purchase of 13 Artillery Drive, or of the sale actually being completed, and if there was finance obtained, it was not from Westpac and Ms Taylor had no knowledge, nor means of gaining knowledge, of such arrangements, even if she wanted, or was obliged to under the Real Estate Agents Act 2008 (“REA Act”) or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“REACOCR”), which she is not (see also Point 5 above).
- Please note, the recounting of the Committee’s assertions in that paragraph of the Charges Decision, by the READT, is not an error of fact - it is the READT’s reliance upon those assertions as evidence or fact supportive of its findings against the appellant that is the error of fact, and the Tribunal’s apparent belief that it could so rely, that is the error of law.

9. **Refer paragraph [21] of the Decision as to Charges:** The READT erred in fact and law, when it ultimately determined that (as to the Committee’s contention):

- 9.1 *“...that the pattern of dealings involving Ram and the associated persons who were parties to the contracts amounted to mortgage fraud schemes.”* – the pattern of dealings and associated persons cannot amount to fraud, unless the legal elements of mortgage fraud are present.
 - 9.2 *“It was in order to further these schemes that the parties wanted to involve a reputable real estate company to lend an image of respectability.”* – in order for there to be a fraud scheme to further, the legal elements of a fraud have to be present. They are not. All you have then are parties to a Sale & Purchase transaction at a ridiculous high on-sell price, wanting to engage an Agent.
- Please note, the recounting of the Committee’s contention in that paragraph of the Charges Decision is not an error of fact - it is the READT’s reliance upon that contention as evidence or fact supportive of its findings against the appellant that is the error of fact, and the Tribunal’s apparent belief that it could so rely, that is the error of law.

10. **Refer paragraph [25] of the Decision as to Charges:** The READT erred in fact and law, when it summarised Ms Taylor's counsel's submissions to it in that paragraph. That summary was not the extent nor the important element of counsel's submissions to the READT. That was counsel's submissions that the evidence before the Tribunal did not even come close to identifying fraudulent mortgage scheme transactions and there needed to be more than the evidence that was put forward, to find the appellant guilty of any of the charges she faced.
11. To fail to refer to that submission and, subsequently and ultimately, to determine fraud present (and obviously so, as determined by the Tribunal), as the basis for the appellant's conviction, is to omit from the decision that the Tribunal was on notice through that submission, that the issue and its findings on same would be challenged if it is not considered thoroughly and correctly in their decision (which it was not).
12. **Refer paragraph [30] of the Decision as to Charges:** The READT erred in fact and law when it summarised the issue before it as having to decide, as a matter of fact, whether Ms Taylor understood that she was assisting a dishonest scheme and, if determined in the affirmative, only then is it established that she was acting dishonestly – that is not an accurate summary of the issue that was before the Tribunal, and it is not reflective of the wording of the Charges laid by the Committee, before the Tribunal, under section 91 of the Act, and dated 11 December 2017.
13. **Refer paragraph [32] of the Decision as to Charges:** The READT erred in fact and law when it determined "*...little doubt that Ms Taylor's principals were engaged in a form of mortgage fraud. The behaviour of the principals is not explicable in any other way.*"- there was no evidence before the Tribunal of mortgage fraud and absent such evidence, there are any number of ways that the behaviour of the principals could be explained or interpreted, but that is not a requirement placed upon an agent under their governing statute and code and nor is it one of the extensive powers afforded the Tribunal under section 109 of the Act – supposition and speculation is not evidence.

14. **Refer paragraph [33] of the Decision as to Charges:** The READT erred in fact and law when it determined “*..Ms Taylor was not prepared to accept that she knew that the scheme which the principals adopted amounted to attempted mortgage fraud.*” – the implication in that finding suggests that there was evidence before the Tribunal of a mortgage fraud scheme when there wasn’t, that Ms Taylor should have known there was a fraudulent mortgage scheme created by the ‘principals’ when she didn’t, and that her unwillingness to accept the presence of a fraudulent mortgage scheme was a matter the Tribunal could and should take into account when determining the Charges she faced, when it could not and should not.
15. **Refer paragraph [35] of the Decision as to Charges:** The READT erred in fact and law when it determined:
- 15.1 “*...We are prepared to accept that because of the lack of experience or commercial background she did not discern the precise way that the principals' scheme would take effect. But we do not accept that the exact identification of the nature of the scheme means that the Tribunal ought to conclude that she did not know that her principals were acting in a devious manner which was intended to mislead a party.*” – In order for the appellant to know that her ‘principals’ were acting in a ‘devious manner’, there has to be evidence of a ‘scheme’ upon which knowledge that it was a ‘scheme’ and it was ‘devious’ could be ascertained, as well as evidence that said ‘scheme’ was intended to mislead a party – there was no such evidence before the Tribunal.
- 15.2 “*...Ms Taylor told us that she thought there was something "strange" about the transactions. She said that she was very "uncomfortable" about the situation that she found herself in. However, she said, she felt that she had no option but to proceed with writing up the transactions in regard to Artillery Drive or Shirley Avenue.*” – that is only part of what Ms Taylor said concerning the transactions, selected from the paragraph of her evidence in which she also stated that she checked the REAA Rules to see if there was anything that would enable her to remove herself from the transactions. The context of what little evidence was before the Tribunal is as critical to its powers of determination as the wording of the evidence itself.

Just as critical is that the Tribunal avoid relying upon excerpts of the appellant's evidence in the same paragraph and omitting the remainder, when to do so contextualises what was said as supportive of *mens rea* for the Charges, when the whole of the paragraph suggests otherwise – failure to do so raises a miscarriage of justice argument and an error of law.

16. **Refer paragraph [36] of the Decision as to Charges:** The READT erred in fact and law when it determined:
 - 16.1 *“...The admission of Ms Taylor that the transaction seemed strange was properly made because the principals were paying well above market prices for properties. It might have been supposed that this factor would have led a reasonably well-informed licensee involved in the matter to try and seek an explanation as to the reason why the principals were apparently acting in a counter-intuitive manner...”* – Ms Taylor's evidence before the Tribunal identified that she did seek an explanation, from the vendor and the purchasers in the transactions, as far as it was politic to do so, and she sought advice from her manager, who also noted the high on sell price but gave no indication that such a factor in the transactions identified fraud or dishonesty, simply because by itself it does not.
 - 16.2 *“...Again, it might have seemed likely that that was one of the reasons why the principals were attempting to manufacture sales evidence that purported to establish that the properties were worth more than they actually were. If the value of the properties were higher, then greater security margins would be available to a lending bank...”* – that would seem likely, if there was evidence that the ‘principals’ were manufacturing sales evidence to create a higher price value for the property, but there was no such evidence before the Tribunal.
17. **Refer paragraph [37] of the Decision as to Charges:** The READT erred in fact and law when it determined:
 - 17.1 *“...In our view, she acted deliberately to promote a dishonest scheme...”* – there was no evidence before the Tribunal of a dishonest scheme, or of the appellant acting deliberately to promote it.

17.2 *“...The conclusions which we have expressed are based upon the fact that the transactions were simply inexplicable as normal property acquisitions by purchasers wishing to acquire a property on not unfavourable terms having regard to the indicated market value of the property...”* - the lack of explanation of the transactions is not a sound basis, in fact or law, for a Tribunal to make a conclusion against the appellant. A lack of explanation for the transactions is not a fact or evidence, upon which a such a conclusion could or should be reached, even under section 109 of the Act.

17.3 *“...As well, the payment of considerable amounts by way of commission in circumstances where she was not required to discharge the customary obligations of the real estate agent to market the property, must have caused her to question why people in the position of her principals were essentially paying money away without receiving in return any obvious benefit which was proportionate to the amounts which they were paying her...”*

- The evidence before the Tribunal was that Ms Taylor received commission of \$10,000.00 from the sale of 10 Kilbryde Crescent. Of that, she received \$3,500.00 before tax and GST – the remainder going to her employer – L J Hooker.
- There was no evidence that the completed sale was not genuine, there was no REAA complaint as to the sale, and that property was not the basis of the Charges laid against the appellant.
- The appellant did not receive commission on the two properties upon which the Charges were laid against her and the sales were not completed.
- Agents fees on the three (3) properties, based on market averages, would be at 2.5% or 3% up to \$350,000.00 and anything over and above \$350,000 is based on 2% commission, so that the fees an agent would normally expect for the other two properties is \$25,000.00 and \$37,500.00 respectively.
- Had the appellant received commission on those two properties, they would not have been considerable amounts’ and reflective of the limited role she played, in which she carried out her duties under and in accordance with the REAA Rules.
- The errors of fact in this conclusion are clear. The error of law is concluding they are a sound basis for determining knowledge and deliberate acts complicit in wrongdoing by principals that has not been proven.

18. **Refer paragraph [38] of the Decision as to Charges:** The READT erred in fact and law when it determined:

18.1 *"...Ms Taylor may not have been motivated by a desire to damage the interests of the lending bank:/s..."* – There was no evidence before the Tribunal that could be construed to suggest she was so motivated, or that the bank involved in ONE sale had its interest damaged or was ever at risk of its interest being damaged.

18.2 *"She may well have understood that she had nothing to lose or gain depending on whether the principals succeeded in whatever they were trying to achieve because she would receive her commission irrespective of that outcome. But these matters do not give her a defence to the charge. It is enough that she deliberately assisted dishonest conduct irrespective of consequences to third parties."* – Ms Taylor was not assisting dishonest conduct because there was no evidence of dishonest conduct, either by her or anyone else. Ms Taylor was not leaving it to chance whether the bank was deceived. Based upon the evidence before her and the Tribunal (including her own evidence), there was no way that the purchasers would obtain finance, unless there was supporting documentation that inflated the value of the properties – there was no such documentation. Ms Taylor was not receiving commission, regardless of outcome of a finance application - the sales were conditional upon finance.

19. **Refer paragraph [39] of the Decision as to Charges:** The READT erred in fact and law when it determined:

19.1 *"...We also consider that an agent of good standing or a reasonable member of the public would consider what Ms Taylor did as disgraceful..."* – there was no evidence before the Tribunal for such consideration to be reached and no agent or member of the public so described would reach such a consideration with what was before the Tribunal. There was no evidence before the Tribunal sufficient to support a finding of disgraceful conduct against Ms Taylor.

19.2 *"...Such persons would take the view that Ms Taylor deliberately acted in a way that contravened a significant obligation that was (sic) incumbent on Ms Taylor. The obligation was to refrain from assisting clients to attempt to obtain finance from a bank by misleading it on the question of whether the proposed lending was supported by proper security..."*

– Such persons would not take that view, based upon the evidence that was before the Tribunal. The refrain asserted was met by Ms Taylor. There was only one bank loan application. It had no supporting documentation construed, altered or made up to suggest the purchase price was at market value and Ms Taylor knew that such an application could not possibly succeed. The bank was not misled and the appellant, in any event, did nothing to assist that non-existent deception.

20. **Refer paragraphs [41] to [45] of the Decision as to Charges:** The READT erred in fact and law when it determined, as to the submissions put to it by appellant's counsel that issues such as:
- 20.1 The Committee asserting the appellant being wilfully blind concerning the nature of the dealings by the 'principals'; and,
 - 20.2 Knowledge of the alleged fraud or dishonest scheme; and,
 - 20.3 Lack of training by REAA in both educating agents on the legal elements of mortgage fraud and the extent of their duties to identify and deal with such instances, in the scope of their role as agents; and,
 - 20.4 The responsibility of agents to protect the interests of banks;
 - were contrary to the evidence and plainly wrong - By relying upon conclusions permeated by errors of fact and law, to consider such submissions as erroneous to findings that the appellant had actively participated in the fraud, or dishonest scheme (when there was no evidence of a fraud or dishonest scheme and the appellant's presence in the transactions is not evidence of complicity, other than in performing her regulated duties as an agent) is to present in its decision disregard for submissions dependent upon the evidence before the Tribunal, rather than allegations, contentions and supposition, is to perpetuate a miscarriage of justice
21. **Refer paragraphs 46 to 50 of the Decision as to Charges:** The READT erred in fact and law when it determined, as to the alternate Charge laid under section 73(b) of the Act, was proved if it was wrong about the section 73(a) Charge, because the conclusions reached by it were based upon evidence of complicity by the appellant in the fraud or dishonest transactions and the appellant had failed to present innocent alternatives to that evidence.

– it is not beholden upon the appellant to disprove the Tribunal’s conclusions on the evidence before it, when the evidence before it fails to support those conclusions.

22. To suggest otherwise is not only an error of fact and law, but also creates a logical inconsistency – if there was evidence supportive of the Tribunal’s conclusions, the appellant rendering an innocent explanation for such actions would heighten the appearance of complicity, but when there is no such evidence of wrongdoing, an innocent explanation is unnecessary – there being no guilty explanation to counter – counterintuitive activity by the “principals” does not, of itself require explanation by the appellant and is not, of itself, evidence of wrongdoing.
23. And yet explanations were suggested for the activity the Tribunal considered fraudulent – such as the purchasers thinking it worth the purchase price, because in a matter of months in the then volatile seller’s market, the property would be worth in excess what they had paid, even if above current valuation, or that, on one of the transactions, there was a collateral agreement that saw the vendor providing improvements to the property post-settlement, that would increase the property’s value, or that the property was not purchased for future on-sell, but instead as a family home that was envisaged as worth more than its market value – absent the essential element for the existence of fraud, the act of deception through a document or other recognised indicator of a property’s value being tendered to a lender to suggest a value more than it actually was. Absent such evidence, those explanations are just as, if not more so, credible as the Tribunal’s findings, simply because they are made in reliance upon the evidence that failed to identify fraud or dishonesty.
24. **Refer paragraphs 1 to 30 of the READT decision as to Penalty:** The Tribunal erred in fact and law when determining that any penalty imposed on the appellant was correct and appropriate, given that it was based upon findings of the Tribunal that were wholly dependent upon conclusions of the existence of mortgage fraud, or ‘dishonest schemes’, or ‘dishonest transactions’ and the appellant’s active and knowing participation in that conduct, when no such evidence existed, let alone was proved.

25. Any penalty in those circumstances is wrong in fact and law, and any critique of the appellant or her counsel in failing to acknowledge her wrongdoing and availing the Tribunal the opportunity to address and rectify the miscarriage of justice arising from the decision as to charges, rather than having to go through the expense of an appeal, and to consider that criticism as relevant to the ultimate findings of the Tribunal as to penalty, is to ignore the natural consequence of any party so aggrieved by such findings and insist upon a fiction of stated remorse for wrongdoings that did not occur, in order to consider such contrition as a factor in the severity of the penalty, is simply a furtherance of the prevalence of a miscarriage of justice in the Tribunal proceeding.
26. The Appellant brings this Appeal pursuant to section 1116 of the real Estate Agents Act 2008 and Part 20 and Rule 20.4 of the High Court Rules 2016.
27. The Appellant is not legally aided for the purposes of this Appeal.

DATED at Auckland this ^{16th} day of November 2018



Paul F. Chambers
Counsel for the Appellant

This Notice of Appeal is filed by Mark Henley-Smith, solicitor for the Appellant and principal of Henley-Smith Law. The address for service of the Appellant is at the offices of Henley-Smith Law, 1 Captain Scott Road.

Documents for service on the filing party may be left at that address for service or may be—

- (a) Posted to the solicitor at PO Box 20067, Glen Eden, Auckland 0641; or,
- (b) Transmitted to the solicitor by facsimile to (09) 818-6449; or,
- (c) Posted to the Appellant's duly instructed counsel, P F Chambers, Barrister, at PO Box 41351, Auckland 1346.
- (d) Transmitted to the Appellant's duly instructed counsel by email to paul.chambers@vodafone.co.nz.

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 24

READT 046/17

IN THE MATTER OF

Charges laid under section 91 of the Real
Estate Agents Act 2008

BROUGHT BY

THE REAL ESTATE AGENTS
AUTHORITY (CAC 413)

AGAINST

TRACY TAYLOR
Defendant

Hearing:

11-12 June 2018

Tribunal:

Mr J Doogue, Deputy Chairperson
Ms N Dangen, Member
Ms C Sandelin, Member

Appearances:

Mr M Hodge, on behalf of the Committee
Mr P Chambers, on behalf of the defendant

Date of Decision:

9 July 2018

DECISION OF THE TRIBUNAL

[1] Ms Taylor is charged with conduct which was disgraceful for a licensee pursuant to s 73(a) of the Real Estate Agents Act 2008 ("the Act") or alternatively that her conduct constituted seriously incompetent or serious real estate agency work contrary to s 73(b) of the Act. As a further alternative, she is charged under s 72 with unsatisfactory conduct.

[2] Ms Taylor was a licensed salesperson under the Act and was a member of the L J Hooker franchise network. She became involved in three transactions which involved purchases of property and on-sale of those properties between members of a group of persons who appear to have been associated with a person called Ramasubramanian Narayanaraja. The parties themselves who were associated with this person and of whom further mention will be made shortly and Ms Taylor referred to this person as "Ram" and for convenience the Tribunal shall adopt the same nomenclature.

[3] While Ms Taylor was associated with the L J Hooker Ellerslie franchise she met Ram at an open home. Through him she was introduced to his wife, Prema ("Prema") and the brother of Ram, Jaz-Deepak Singh (to whom we shall refer as "Jazz").

[4] On 8 June 2016 Mr and Mrs Boys who were the owners of a property at 10 Kilbryde Crescent at Pokeno (Kilbryde Crescent) placed their property for sale with an agency which was part of the Remax network. The listing agent provided a comparative market analysis (CMA) indicating a selling range between \$710,000 and \$730,000. On 15 July 2016 Prema acquired the property at a price of \$715,000 with the agreement becoming unconditional 5 August 2016.

[5] It was around this time that Ms Taylor again met Ram and through him was introduced to Prema and to Jazz. Jazz appears to be the brother of Ram. Even before settlement had occurred, Prema instructed Ms Taylor as her agent to on sell the property in return for a fixed commission of \$10,000. Ms Taylor provided an estimated selling range for the property of between \$800,000 and \$900,000. This was a surprising uplift in the apparent value of the property as will be commented on

further later in this decision. The property was sold on 17 July 2016 to Mr and Mrs Yadav for \$899,000. Mr Yadav had told Ms Taylor that a finance condition was not required as he has received pre-approval for finance. Ms Taylor prepared the agreement for sale and purchase (ASP). The sale settled ostensibly on the basis of a price of \$899,000 being paid and Ms Taylor received her \$10,000 commission.

[6] Evidence was given that Mr Yadav was a friend of Jazz.

[7] In her evidence Ms Taylor would not accept that there was anything surprising about the on-sale price of the property to the Yadavs. The fact that the more or less simultaneous on-sale price was \$184,000 more than the price at which Prema purchased it was able to be explained, in her view. Ms Taylor said that the original sale to Prema from the Boys had been at a substantial undervalue.

[8] The sale of Kilbryde Crescent was not one of the matters that was directly the subject matter of a charge against Ms Taylor. Mr Hodge, counsel for the committee, said that it was referred to as a matter of informative background to the charges in respect of other properties which will be mentioned shortly.

[9] The next property transaction in chronological order concerned a sale of a property at 4A Shirley Avenue, Papakura. That property had been listed with an agent called Ms Attrill of L J Hooker at Takanini. Ms Attrill prepared a comparative market analysis ("CMA") recommending a sale price of between \$745,000 and \$780,000.

[10] The next transaction occurred on 29 August 2016 in which Ram purchased from Thomas Yu Holdens Limited a property at 13 Artillery Drive, Papakura. The purchase price for the property was \$780,000. Ram then sold this property to Jazz on 29 August 2016, the same day. The sale price of this on sale was \$1.1 million dollars. Ram had, on the face of it, made a gain of \$320,000 on the purchase and sale of this property. Once again, on each of the transactions relating to 13 Artillery Drive, Ms Taylor received \$10,000 commission.

[11] Associated with these transactions, applications were made to the Westpac Bank for finance. Between the dates of 28 August 2016 to 30 August 2016 the first of these agreements that was submitted to Westpac was for the sale of 4A Shirley Avenue. The lending manager at Westpac who dealt with these applications was Ms Rutherford. She had taken them over from a former mobile mortgage manager Annu Naran who was on holiday out of the country and had asked her to look after any of her "customer enquiries" while she was away. Ms Rutherford does not state how much the purchasers, the Yadav's, were expecting to borrow. The part of the transaction relating to 4A Shirley Avenue which was provided to Ms Rutherford was the onward sale to the purchasers just named. The purchase price that Ram had paid, \$820,000 was not apparently disclosed. Ms Rutherford considered the application and came to the view that the "estimated selling range" was between \$691,667 and \$832,330.

[12] To obtain more information about the transaction Ms Rutherford approached the manager of the branch to which the licensee was then attached, L J Hooker, Ponsonby, a Mr Bryan Richardson. Ms Rutherford told Mr Richardson that she had concerns about the variation between the sale price and her assessment of the value. It turned out that the purchasers did not proceed with an application for finance from Westpac Bank.

The contentions of the Committee

[13] The first transaction in chronological order which the Committee makes reference to is that relating to 10 Kilbryde Crescent, Pokeno. This transaction is not actually a subject of a particular charge against Ms Taylor. The Committee considered that the transaction provided relevant evidence showing an overall pattern of conduct on the part of Ms Taylor which was relevant to the assessment of the conduct which was specifically relied upon as the basis for the charges brought against her.

[14] In regard to the Kilbryde transaction, the Committee alleges that the significance of Kilbryde is that it was the transaction in which the defendant was introduced to key individuals who were later involved in the on sales of Shirley Avenue and Artillery Drive, namely Ram, Prema Ramasubramanian, Jazz, Rahul Yadav, and Happy Sharma Yadav. It was further significant because it marked the commencement point of a pattern where Ms Taylor as the selling agent received \$10,000 plus GST in commission. It was relevant, Mr Hodge said, for the further reason that Ms Taylor derived a commission from the sale even though she had not been required to market it and did not introduce the buyers to the seller. As well, the buyers were part of a group of persons linked back ultimately to Ram who was the husband of the vendor, Prema. The only service that Ms Taylor appears to have provided was to draw up the agreement for sale and purchase which the parties executed.

[15] The next transaction occurred 28th August 2016 and related to 4A Shirley Avenue. Ram had acquired this property in an apparent arms-length transaction for a price of \$820,000 and on-sold it the same day for \$1,190,000.

[16] The buyers were Jazz and Mr and Mrs Yadav. Again, in regard to this property, Ms Taylor was instructed to act as agent. She prepared the ASP and received an agreed commission of \$10,000. She did not provide Ram with a CMA or carry out any marketing work in relation to the property, the parties already having agreed the on- sale price between themselves

[17] The Committee regarded the transaction as questionable for a number of reasons with the first being because of the increase in sale price at which the on-sale took place, the increase being \$370,000 which was unexplained. Further, the Committee considered it significant that Ram and Jazz, one of the buyers, were known to each other and also that the Yadavs had been the purchasers of Kilbryde Crescent from Ram. Further, Ram had told Ms Taylor, according to Ms Taylor's statement of 29 September 2016, that he had an intention to on -sell Shirley Avenue to a family member. As well, the sale price for the on -sale was well above market value according to a comparative market analysis (CMA) which

another L J Hooker agent, Ms Attrill had provided for the vendors prior to sale which placed the recommended selling range between \$745,000 and \$780,000.

[18] As well it was relevant that the purchasers from Ram were going to require finance for the transaction and intended to submit the on-sale purchase agreement as the basis for a finance application to the bank.¹

[19] The next transaction involved 13 Artillery Drive. Ram had agreed on 29 August 2016 to buy the property for \$780,000. The on-sale purchasers were Jazz and A Narayan. The price for the on-sale was \$1.1m and the agreement was dated the same date, namely, 29 August 2016. Again, Ms Taylor was instructed as the agent and again received a flat commission of \$10,000. She did not provide Ram with a CMA or carry out any marketing work in relation to the property, the parties already having agreed the on-sale price between themselves.² As well the Committee points to the fact that finance was going to be required for the transaction and that the purchase agreement would be the basis of a finance application to the bank.

The transactions overall

[20] In general terms, the case for the Committee was that there were two aberrant aspects to the transactions. In summary, there were the significant over market prices obtained for the on sale of 4A Shirley Avenue and 13 Artillery Drive. Secondly, in none of the transactions was Ms Taylor involved in facilitating negotiations about price and representing the vendor's interest in that regard. In both the second and third transactions (4A Shirley Avenue and 13 Artillery Drive) finance was going to be required and the purchasers intended to provide the agreements to a bank to support an application for finance.

[21] It was the contention of the Committee that the pattern of dealings involving Ram and the associated persons who were parties to the contracts amounted to mortgage fraud schemes. It was in order to further these schemes that the parties wanted to involve a reputable real estate company to lend an image of respectability

¹ See statement of Ms Taylor [BD 143].

² BD 176.

to the transactions and Ms Taylor went along with this. Ms Taylor must have appreciated that the transactions involved dishonesty because of all of the foregoing features that have been referred to.

The defences

[22] Ms Taylor's defence was that she did not know what mortgage fraud was. She agreed that there was something "strange" about the transactions that the parties were entering into. However, Ms Taylor said that she considered whether any particular duty that she owed as a licensee was being breached and could not think of any way in which her involvement in the transactions violated her obligations as a licensed real estate agent.

[23] It was Ms Taylor's contention that she did give consideration to whether she should withdraw from the transaction involving 4A Shirley Avenue but events had gone too far and for that reason and because of pressure which she said she was placed under by Ram she elected to continue facilitating the transactions.

[24] Ms Taylor was critical of the fact that she had not been provided training or education which would have alerted her to mortgage-fraud transactions. She was of the view that when her manager became involved he did not appear to appreciate that the transactions could be of a fraudulent nature and that it was only the intervention of Ms Rutherford from Westpac calling to discuss matters with the manager, Mr Richardson, that exposed the extent of the problem with the agreements. She resisted any suggestion in cross examination that she and her franchise company, L J Hooker, were being used as pawns to foster the impression that the transactions being carried out through a reputable agency were bona fide.

[25] Counsel for the licensee, Mr P Chambers, submitted Ms Taylor's conduct did not breach any explicit obligation which was incumbent upon her because of the provisions of the Act or which arose from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. That being so, it could not be contended that the conduct of the licensee amounted to disgraceful conduct or serious negligence.

Principles

[26] In the decision of *READ v Phillips*³ the Tribunal considered the question of what type of conduct would qualify as "disgraceful". The Tribunal adopted statements by the New South Wales Court of Appeal in *Pillai v Messiter*. In *Pillai v Messiter*⁴ the New South Wales Court of Appeal considered the statutory test of "misconduct in a professional respect" under the Medical Practitioners Act 1938 (NSW). Kirby P said (at 200):

"With the latest, and further, amendment it is arguable that the substitution of the new statutory test of 'professional misconduct' may introduce for consideration a wider class of conduct than has hitherto been regarded as relevant. But that is a question which can remain for a future case. It may not be examined in this appeal, because of the way in which the case was conducted before the Tribunal.

'Misconduct' means more than mere negligence:

The words used in the statutory test ('misconduct in a professional respect') plainly go beyond that negligence which would found a claim against a medical practitioner for damages: *Re Anderson*, (at 575). On the other hand, gross negligence might amount to relevant misconduct, particularly if accompanied by indifference to, or lack of concern for, the welfare of the patient: cf *Re Anderson* at (575). Departures from elementary and generally accepted standards, of which a medical practitioner could scarcely be heard to say that he or she was ignorant could amount to such professional misconduct: *ibid*. But the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner: cf *Allinson* (at 760-761). These are the approaches which have been taken in our courts. They have been taken in the courts of England where such misconduct is alleged. And they have similarly been taken in the courts of the United States. The entry in *Corpus Juris Secundum*, vol 58, (1948) at 818, reads:

"Both in law and in ordinary speech the term "misconduct" usually implies an act done wilfully with a wrong intention and conveys the idea of the intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; but it does not necessarily imply corruption or criminal intention, and, in the legal idea of misconduct, an evil intention is not a necessary ingredient. The

³ *READ v Phillips* [2016] NZREADT at [14]

⁴ *Pillai v Messiter* (No.2) [1989] 16 NSWLR 197

word is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences."

[27] In *Phillips*⁵ the Tribunal stated that the purpose of professional disciplinary cases is to maintain professional standards and to protect the public. It is correct that section 3 of the Act contains an explicit statement of the purpose of the Act which is broadly to promote and protect the interests of consumers and to promote public confidence in the performance of real estate agency work. These purposes are to be achieved by, amongst other things, raising industry standards and providing accountability through the disciplinary process⁶. Consideration of the elements required to be established on a charge of disgraceful conduct is also assisted by having regard to the scheme of section 73 which establishes misconduct as a disciplinary offence. It is also assisted by having regard to the fact that a separate section of the act, section 72, deals with unsatisfactory conduct which will be established where it is proved that the licensee carried out real estate agency work that fell short of the standard that a reasonable member of the public is entitled to expect, contravened a provision of the Act or regulations, is incompetent or negligent or would reasonably be regarded by agents of good standing as being unacceptable.

[28] As well, the internal arrangement of Section 73(2) provides that misconduct will be established if the licensee's conduct is seriously incompetent or seriously negligent. Those separations in our view support the conclusion that the statement of the position of the New South Wales Court of Appeal in *Pillai* is applicable to charges of disgraceful conduct under section 73.

⁵ [2016] 39 READT at [16]

⁶ Section 3

Assessment

[29] Disgraceful conduct is intentional conduct.

[30] The issue the Tribunal has to decide is whether, as a matter of fact, Ms Taylor understood that she was assisting a dishonest scheme. Only if this is established, can it be said that Ms Taylor was acting deliberately.

[31] The next issue is whether agents of good standing or reasonable members of the public would reasonably regard the conduct of Ms Taylor as being disgraceful. It is correct that mere professional competence or deficiencies in the way the licensee carries out his or her obligations are not sufficient.

Issue one

[32] In this case, there seems to the Tribunal on the evidence before it to be little doubt that Ms Taylor's principals were engaged in a form of mortgage fraud. The behaviour of the principals is not explicable in any other way.

[33] Ms Taylor says that she did not appreciate that that was the case. Ms Taylor was not prepared to accept that she knew that the scheme which the principals adopted amounted to attempted mortgage fraud.

[34] Ms Taylor gave evidence that she expected that the transactions would not get past the bank. She said that one of the parties involved had said to her that this would not happen because the borrowers had a pre-approval from the bank. She said that she attempted to disabuse him of his mistaken view and to make it clear that the bank could still decline finance even if there had been a pre-approval.

[35] We are prepared to accept that because of the lack of experience or commercial background she did not discern the precise way that the principals' scheme would take effect. But we do not accept that the exact identification of the nature of the scheme means that the Tribunal ought to conclude that she did not know that her principals were acting in a devious manner which was intended to mislead a party who would be affected by the transactions. Ms Taylor told us that she thought there

was something "strange" about the transactions. She said that she was very "uncomfortable" about the situation that she found herself in. However, she said, she felt that she had no option but to proceed with writing up the transactions in regard to Artillery Drive or Shirley Avenue.

[36] The admission of Ms Taylor that the transaction seemed strange was properly made because the principals were paying well above market prices for properties. It might have been supposed that this factor would have led a reasonably well-informed licensee involved in the matter to try and seek an explanation as to the reason why the principals were apparently acting in a counter-intuitive manner. Of course, as an agent active in the sector of housing that Ms Taylor participates in, a familiar problem for buyers would be accessing finance when there were low levels of equity available by way of security. Again, it might have seemed likely that that was one of the reasons why the principals were attempting to manufacture sales evidence that purported to establish that the properties were worth more than they actually were. If the value of the properties were higher, then greater security margins would be available to a lending bank.

[37] In our view, she acted deliberately to promote a dishonest scheme. The conclusions which we have expressed are based upon the fact that the transactions were simply inexplicable as normal property acquisitions by purchasers wishing to acquire a property on not unfavourable terms having regard to the indicated market value of the property. As well, the payment of considerable amounts by way of commission in circumstances where she was not required to discharge the customary obligations of the real estate agent to market the property, must have caused her to question why people in the position of her principals were essentially paying money away without receiving in return any obvious benefit which was proportionate to the amounts which they were paying her. It was inherently unlikely that Ms Taylor's cooperation was being sought to achieve an innocent outcome. Ms Taylor is reluctant to admit that she may have assisted a fraudulent mortgage finance application/s. But the matters that she admits to make it plain that is what she was doing.

[38] Ms Taylor may not have been motivated by a desire to damage the interests of the lending bank/s. She may well have understood that she had nothing to lose or gain depending on whether the principals succeeded in whatever they were trying to achieve because she would receive her commission irrespective of that outcome. But these matters do not give her a defence to the charge. It is enough that she deliberately assisted dishonest conduct irrespective of consequences to third parties.

Issue two

[39] We also consider that an agent of good standing or a reasonable member of the public would consider what Ms Taylor did as disgraceful. Such persons would take the view that Ms Taylor deliberately acted in a way that contravened a significant obligation that was incumbent on Ms Taylor. The obligation was to refrain from assisting clients to attempt to obtain finance from a bank by misleading it on the question of whether the proposed lending was supported by proper security.

[40] Given that our view is that a charge under section 73(a) is established on the evidence, we are not required to consider the alternative charge brought under section 73(b). Had we not reached the conclusion we have with relation to charge 1, we would have found that the alternative charge 2 was proved. However, there is no requirement for us to consider charge 2 which was laid as an alternative alleging Ms Taylor was guilty of unsatisfactory conduct under section 72.

Other matters raised by Ms Taylor

[41] In the submissions which he filed Mr Chambers disputed the assertion that was made on behalf of the Committee that Ms Taylor was wilfully blind concerning the nature of the dealings that she was involved in.

[42] It will be apparent from what we have already said that it is our assessment that Ms Taylor knew the outline of the dishonest scheme. She might be reluctant to admit that she knew that fraud was involved, but our conclusion is that she is not to be believed when she says she did not know that her principals were attempting to practise fraud on the bank/s. We accept that Ms Taylor had not had many years of experience as an agent. She may not have learnt about the details of past incidents of

mortgage fraud. But on the other hand, she was not so naïve as not to know that her principals had dishonest intentions. Our judgment is based upon the way she responded to the allegations against her and, in particular the evidence that she gave when under oath before the Tribunal. She gave us the impression that she was a person of intelligence.

[43] We do not consider that this was a case in which the licensee convinced herself of a state of affairs even though it was contrary to all the evidence. Ms Taylor actually understood what her principals were attempting in this case.

[44] Mr Chambers was critical of a lack of training provided to Ms Taylor - presumably by her franchise group - that, in his view, might have better equipped Ms Taylor to understand the ramifications of what her principals were engaged in. Because we have decided that Ms Taylor knew enough to understand that the principals were engaged in illicit conduct, we do not know if such further training or instruction, if indeed it should have been provided, would have made any difference.

[45] Mr Chambers also submitted that the agent is not responsible for protecting the interests of the bank. We do not accept that this is an answer to a charge that an agent assisted her client to attempt a fraud on a bank. This is not a case where in legal parlance, Ms Taylor is being called to account for "non feasant". Rather the charge is based on the positive acts of the licensee which provided assistance to the principals to attempt a fraudulent scheme.

Alternative charge

[46] An alternative charge which is brought is that the conduct of Ms Taylor constituted seriously incompetent or seriously negligent real estate agency work: s 73(b). Because we have determined that the charge under s 73(a), it is not strictly necessary for us to consider the alternative charge. It may however be helpful for us to do so.

[47] Understanding the legislation requires consideration of the requirement that Ms Taylor was "seriously" incompetent or negligent. That would seem to be a term which qualifies the extent of the failure of the conduct. It is not concerned with whether the consequences of the incompetence or negligence were serious.

[48] In our view, even if our conclusions on the s73(a) are incorrect, a charge under s 73(b) is established for the following reasons.

[49] Prima facie, the suspicious hallmarks of the transactions which Ms Taylor knew about showed that the transactions were dishonest. Ms Taylor has not suggested a basis on which it could determine that the prima impression is incorrect or that the facts were equivocal about whether or not dishonesty was involved. Ms Taylor has not proposed some innocent alternative scenario which would lend an innocent complexion to the arrangements.

[50] Ms Taylor was therefore put on enquiry. She needed to ask why these related parties were engaged in, amongst other things, the seemingly counter-intuitive activity of on-selling to one of their number at vastly inflated prices. She ought to have sought advice from a senior associate or a manager at her company if she did not receive a proper answer. Her failure to do so was seriously incompetent or seriously negligent under s73(b).

[51] A hearing date will now be set for a decision on penalty, all counsel are to liaise with the Tribunal Registry as to a date for this hearing. Once set the following timetable will apply, counsel for the Authority are to file and serve submissions on penalty not less than 15 working days before the hearing and counsel for the defendant are to file and serve submissions on penalty no less than 5 working dates before the hearing.

[52] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.


J Doogue
Deputy Chairperson




N Dangen
Member


C Salter
Member

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 59

READT 046/17

IN THE MATTER OF

Charges laid under section 91 of the Real
Estate Agents Act 2008

BROUGHT BY

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 413)**

AGAINST

TRACY TAYLOR
Defendant

Hearing:

27 September 2018, at Auckland

Tribunal:

Mr J Doogue, Deputy Chairperson
Ms N Dangen, Member
Ms C Sandelin, Member

Appearances:

Mr M Hodge, on behalf of the Committee
Mr P Chambers, on behalf of the defendant

Date of Decision:

24 October 2018

**DECISION OF THE TRIBUNAL
(PENALTY)**

[1] The Tribunal has heard and determined a charge against Ms Taylor, (**the Licensee**) of misconduct brought pursuant to s 73(a) of The Real Estate Agents Act 2008 (**the Act**). The charge was found to be proved and the Tribunal must now impose the appropriate penalty on the Licensee.

[2] The full factual context of the charges as set out in the liability decision 9 July 2018 and we will not repeat it in detail. It is sufficient to note the main points relevant to the charges which were brought against the Licensee.

[3] In essence, the Licensee was instructed to participate in four real estate transactions purportedly as the selling agent. The transactions however had been arranged by the parties themselves and involved sales of properties to related parties. For each of the transactions in which she was involved the Licensee received a fee, or commission as it was described, of \$10,000. She received these payments without any need to carry out the general obligations incumbent upon a real estate agent. She did not need to market the properties for sale. She had only to draw up the form of agreement between the parties and arrange for its execution.

[4] The basis upon which the case was presented to the Tribunal was that the transactions that the Licensee was involved in had all the hallmarks of, and in substance were, transactions which were intended to mislead lending institutions into believing that the properties had a higher value than they in fact did. The further objective was that the bank or other lending institution would to lend more money on the security of the properties than otherwise they would.

[5] It is necessary to mention that the stance which the Licensee by her counsel, Mr Chambers, took at the penalty hearing before us was that the decision of the Tribunal was wrong in analysing the transactions in the way that it did. The substance of the contentions which counsel put forward was that it had not been proved that the Licensee had been involved in any untoward dealings, had done nothing wrong and that still did not understand as at the date of the hearing how she had allegedly breached the standards required under the Act and the regulatory regime established under it.

[6] It was the right of the appellant to continue to deny any wrongdoing. However, the result is that penalty must be assessed on the basis that the Licensee has not expressed any contrition or regret for her involvement in the transactions. It is also necessary to proceed on the basis that, given the absence of any insight on the part of the Licensee into the nature of the scheme that she had become involved in, that she must be at risk of behaving in a similar way in future if she were to be presented with an opportunity to receive income by facilitating transactions of a similar kind.

[7] The other implication arising from the approach which the Licensee has taken to the question of penalty is that if her view is genuinely held, then she lacks knowledge and judgement to a degree that calls into question her suitability to hold a real estate agents licence.

[8] One possible outcome open to the Tribunal is to impose a financial penalty. However, we were not provided with any material which addressed the ability of the Licensee to pay a financial penalty. Our impression is that she could not pay a fine. It would not be possible to impose a fine which adequately serve the needs of deterrence, both general and specific, that the offending in this case calls for.

[9] It is the view of the Tribunal that in imposing penalty, the options are limited to either a suspension of the Licensee or cancellation of her license.

[10] An order of suspension is postulated upon the view that while it is appropriate for the Licensee to not participate in the real estate business for a period of time, at the conclusion of which there should be no reason why he or she cannot resume working in the industry.

[11] A suspension order can have at least two effects. The first is that it has the potential effect of amounting to a penalty in its own right because of the deprivation of income that the Licensee would have earned in the suspension period. This assumes that the Licensee has remained in the real estate industry and not sought work elsewhere. It would not apply to someone who had taken employment in another type of business. The second effect is that the making of a suspension order is likely to be harmful to the reputation of the Licensee. One potential consequence of a suspension

order is that it may have the effect of limiting future employment opportunities for the Licensee once it becomes known that he or she has previously been suspended.

[12] The Tribunal has carefully considered whether an order of suspension should be imposed in this case.

[13] In the first place, we consider that the Licensee became involved in the transactions because she is commercially naïve and did not think through the consequences of what she was doing. It may have been that she was induced to turn a blind eye to the possibility of a fraudulent scheme because of the easy commissions which were on offer. What was being offered to her was an opportunity to make some money without any real effort being required on her part.

[14] We were concerned by the licensee continuing denial of any wrongdoing and a lack of understanding of how she could have done anything wrong.

[15] It is necessary to deal with some particular points that Mr Chambers made in his submissions. One contention was that there was doubt about whether any concluded fraudulent enterprise had been attempted or had been completed. We understand the contention to be that unless such a scheme was proved to have existed, the Licensee could not be guilty of misconduct. No authority was put forward to support this view.

[16] Before we set out our conclusions on this particular contention it is necessary to consider a further proposition that Mr Chambers put forward. It was to the effect that any supposed mortgage “ramping” fraud was doomed to failure because the bank would have been provided with information that showed that there was a substantial mark-up from the first in each case. The substance of the submission, as we understand it, is that that would have been possible for the bank to review the consideration provided for the first transfer which was the transaction preceding the one that they were to provide finance for.

[17] In our view while this was theoretically possible, it is not open to a Licensee to effectively justify assisting a fraudulent scheme on the basis that it was the responsibility of other parties to identify the correct nature of the transaction that was

being financed. Nor is it a sustainable argument that no harm was done because it was possible that the bank would have identified the jump in value between the first transaction and the one this was financing and that would have led to a line of enquiry which would have exposed the attempt to obtain excessive lending. But this may or may not have occurred and it was not legitimate for the Licensee to assume as a certainty that this would occur.

[18] A Licensee who makes herself available to assist individuals engaged in a dishonest scheme, crosses the line from legitimate practice into deliberate wrongdoing. Conduct of the kind established in this case has a serious effect on the objective in section 3 of the Act which is to foster confidence in the way real estate transactions are carried on in New Zealand. Whether the individuals involved had devised a scheme which was sufficiently sophisticated to actually dupe a lending institution is neither here nor there.

[19] While Ms Taylor claims that she did not understand what the purpose of the principals was in this case, she knew that there was something amiss. Had she paused to question why she was being paid a considerable sum of money for very little effort, she would have appreciated that the situation that she found herself in was too good to be true. She should have appreciated that the persons engaged in the scheme were not going to pay \$10,000 per transaction to her unless they received some benefit from the involvement in the transaction of the Licensee herself and the agency which she represented. We consider that the principals chose to do this because having a licensed real estate agency and a legitimate real estate business involved could help to lend an appearance of legitimacy to the transactions. That in turn would assist their purpose.

[20] We do however acknowledge that the Licensee was not personally involved in the apparent dishonest scheme which the principals had devised. Any benefit that she obtained was limited to the commission she received.

[21] There is no doubt that the conduct here fell below the required standard expected of a Licensee. We further accept, though, that that was not the worst case of its type which can be imagined. We cannot exclude the possibility that the Licensee got involved out of naïveté and that this was not a case of deliberate and cynical offending.

[22] We further consider that a suspension is justified because in its own way it will involve a substantial financial penalty on the Licensee who will be prevented from earning income during the period for which the suspension takes effect.

[23] In its discussions concerning penalty the Tribunal has also considered whether in addition to a suspension there ought to be imposed a requirement to undergo additional training. Such a requirement offers the possibility of allaying any concerns arising from the denial on the part of the Licensee that she had done anything wrong and her failure to appreciate why her conduct was not acceptable.

[24] Mr Hodge in the course of his helpful submissions noted, though, that additional training cannot supply an agent with judgement that she has been demonstrated to lack. We would broadly agree with the submission. There must be some doubt, even if training and education were ordered, that it would bring about any substantial or genuine change on the part of the Licensee.

[25] However, it is possible that if the Licensee was ordered to undergo training or education pursuant to section 93 (d) of the Act that she would, sensibly, take advantage of the opportunity that this would present for her to improve her understanding of the industry that she is involved in and the obligations of licensees such as herself.

[26] We also note that the Licensee says she made an attempt to obtain guidance from her manager¹. Quite why her attempts were not successful is not clear. At the time of disclosing the transaction to her manager, the Licensee apparently told him that there was little chance of the purchaser acquiring finance. He may not therefore have appreciated that he should intervene and check the circumstances of the sale transaction generally.

[27] We appreciate that Ms Taylor has experienced very real hardship in her personal life. While factors such as this must take second place to ensuring that the objectives of the Act set out in s 3 are met, we consider that some weight can be attached to them.

¹ Licensee's "will say" statement paragraph 15

[28] We consider that an order for suspension coupled with a censure and a direction to undergo additional training will provide adequate deterrence in the circumstances of this case.

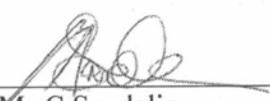
[29] There is need for the Tribunal to send a signal to those engaged in real estate agency business that not only is conduct of this kind a contravention of a licensee's obligations but is also a contravention which is serious in kind. While on this occasion the penalty imposed has been less than cancellation of the licence, such an outcome will be the correct penalty in other cases of licensees lending assistance to mortgage-fraud schemes.

[30] For all of these reasons, we make the following orders:

- [a] the licensee is censured;
- [b] there will be an order that her license is suspended for a period of 18 months from the date of this decision;
- [c] an order pursuant to section 93 of the Act that the licensee undertake not fewer than three training or education sessions, the content of that program to be agreed between the licensee and the Authority. Failing such agreement, we reserve leave to either party to seek further directions from the Tribunal.


J Doogue
Deputy Chairperson


Ms N Dangen
Member


Ms C Sandelin
Member